LCW Liebert Cassidy Whitmore

Briefing Room

News and developments in employment law and labor relations for California Law Enforcement Management.

January 2019

INDEX

LCW NEWS

Briefing Room is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Briefing Room*** should not be acted on without professional advice.

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PERSONNEL RECORDS

Tips for Responding to SB 1421 Requests.

On January 1, 2019, California Senate Bill 1421 went into effect. The new law allows members of the public to obtain certain peace officer personnel records that were previously available only through the *Pitchess* procedure by making a request under the California Public Records Act ("CPRA").

We described this legislation in detail in a previous Special Bulletin (available on the LCW website). In short, SB 1421 amends Government Code Section 832.7 to mandate disclosure of records and information related to certain high-profile categories of officer misconduct: officer-involved shootings, certain uses of force, sustained findings of sexual assault, and sustained findings of certain types of dishonesty.

Immediately after the new law went into effect on January 1, public agencies across California began receiving broad CPRA requests for records covered by SB 1421. Below are our answers to some frequently asked questions and general tips for how to respond to SB 1421 requests.

For case-specific questions, agencies should consult legal counsel to ensure compliance with all relevant laws. To that end, LCW has dedicated a team of lawyers to help clients deal with these time-sensitive and complex requests.

Does SB 1421 apply to records from before January 1, 2019?

SB 1421 does not explicitly state whether it applies to records created before the law's effective date, January 1, 2019, and this question is the subject of some ongoing litigation.

In at least one case, a superior court judge has issued a temporary stay directing a public agency to refrain from retroactively enforcing SB 1421 pending a more detailed hearing. In addition, two police unions separately petitioned the California Supreme Court for a writ barring retroactive application of SB 1421 to records predating January 1, 2019. On January 2, 2019, the Supreme Court denied both of those writ petitions

without commenting on the merits of their legal arguments. None of these cases have any binding effect as precedent, so the question of whether SB 1421 applies retroactively remains unanswered for the moment. It seems likely that the courts will eventually provide some clarification as litigation continues, but the clarification likely will not come in time to help agencies with the first round of requests that they have already received.

In the meantime, pending guidance from the courts or clarifying legislation, we recommend that agencies seek case-specific legal advice to decide whether they will disclose records regardless of when the records were created, or only disclose responsive records that are created after January 1, 2019. Recognizing that there may be some room for debate, we believe that it is more likely than not courts will interpret SB 1421 to require disclosure of at least some records that predate 2019.

Each approach carries with it some risk, so agencies should carefully weigh the risks and potential benefits. In mitigation of some of the risks associated with releasing personnel records predating 2019, agencies should consider providing advance notification to the affected peace officers and their labor unions to afford them the opportunity to seek judicial relief from the anticipated disclosure.

How soon must an agency respond to a request for records?

Under the CPRA, an agency generally has 10 days from the receipt of a request for public records to determine whether any part of the request seeks copies of disclosable records in the agency's possession. However, in "unusual circumstances" the agency may extend this deadline by up to 14 days by providing a written notice to the requesting party.

For purposes of the CPRA, "unusual circumstances" means any of the following:

- The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

For "blanket" requests that seek a wide range of records or information covered by SB 1421, a public agency may have cause to invoke one or more of these grounds, but the determination should be made on a case-by-case basis.

If and when an agency determines that a CPRA request seeks disclosable records, it should "promptly" make those records available or provide copies of them. The CPRA does not set a specific time frame for the actual disclosure of records; this will vary depending on the circumstances of any given request, including the size and scope of the request and the possible need to redact nondisclosable information.

Is SB 1421 limited to records of administrative investigations?

No. SB 1421 applies to "peace officer or custodial officer personnel records" and all other "records maintained by any state or local agency" relating to a covered incident.

This includes, but is not limited to, all of the following:

- Investigative reports.
- Photographic, audio, and video evidence; transcripts or recording of interviews.
- Autopsy reports.
- Materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take.
- Documents setting forth finding or recommended findings.
- Copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

May an agency delay the disclosure of records relating to ongoing cases?

Possibly, depending on the nature of the case. SB 1421 sets out several circumstances in which agencies may delay the mandated disclosure of records.

Internal investigations into sexual assault or dishonesty

Records pertaining to alleged sexual assault or dishonesty by an officer are only subject to disclosure under SB 1421 if the allegations are sustained by a law enforcement or oversight agency. Under Penal Code section 832.8(b), "sustained" means "a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy." Thus, if the investigation is ongoing, or an appeal from discipline is pending, then the allegations have not been sustained and the records are not yet subject to disclosure.

Criminal investigations related to a use of force incident

During an active criminal investigation related to an officer-involved shooting or the use of force resulting in death or great bodily injury, an agency may delay disclosure for up to 60 days from the date the force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever is sooner. The agency may extend the delay further if disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. If disclosure is delayed under one of these provisions, then the agency must comply with several requirements for specific written notice to the requesting party.

Criminal prosecutions related to a use of force incident

If criminal charges are filed related to a use of force incident, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial, or, if a plea of guilty or no contest is entered, the time to withdraw that plea has expired.

Administrative investigations related to a use of force incident

During an administrative investigation of a use of force incident, an agency may delay disclosure of records while the investigating agency determines whether the use of force violated a law or agency policy. The delay is limited to 180 days after the employing agency's discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the use of force, whichever is later.

May a public agency provide redacted versions of requested records?

Possibly, if the redactions are for one of a set of specific reasons outlined in SB 1421:

- To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.
- To preserve the anonymity of complainants and witnesses.
- To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.
- Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.
- Other circumstances not listed above, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information. This language mirrors the catch-all provision of the CPRA, and courts will likely interpret the law similarly.

In particular, it is likely that many records within the scope of SB 1421 contain privileged documents, such as attorney-client communications. Given the high volume of anticipated records requests and the large amount of potentially disclosable files, responding agencies should take particular care in examining responsive records to avoid inadvertently giving away privileged materials.

SB 1421 dramatically increases public access to peace officer personnel records and other public records. But there are a number of issues left unclear and compliance with the new law will require a careful balancing of the public right to access public records against the privacy interests of officers, crime victims, complainants, witnesses and other third parties. Agencies that receive CPRA requests pursuant to SB 1421 should work closely with trusted legal counsel to navigate successfully between these competing interests when responding to the requests.

EXCESSIVE FORCE

U.S. Supreme Court Rejects Excessive Force Claim Against Sergeant, Directs Court of Appeal to Reevaluate Claim Against Arresting Officer.

The U.S. Supreme Court ruled that the Ninth Circuit Court of Appeal erred by allowing an excessive force lawsuit to proceed to trial against a police sergeant who did not actively participate in the incident at issue and by applying the wrong standard in rejecting another officer's qualified immunity defense.

Escondido police officer Robert Craig responded with another officer to a 911 call reporting a possible domestic disturbance at the apartment of Maggie Emmons and Ameteria Douglas. Douglas' mother had placed the call after a phone with her daughter, during which she heard Douglas and Emmons yelling at each other and Douglas screaming for help.

After their arrival, the officers spoke with Emmons through a window, attempting to convince her to open the door to the apartment so that they could conduct a welfare check. During this exchange, Sergeant Kevin Toth and other officers arrived on the scene as backup.

A few minutes later, a man opened the apartment door and came outside. At that point, Officer Craig was standing alone just outside the door. Officer Craig told the man not to close the door, but the man closed the door and tried to brush past Officer Craig. Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. Officer Craig did not hit the man or display any weapon. Video footage of the incident showed that the man was not in any visible or audible pain as a result of the takedown or while on the ground. Within a few minutes, officers helped the man up and arrested him for a misdemeanor offense of resisting and delaying a police officer.

The man, who turned out to be Maggie Emmons' father, Marty Emmons, sued Officer Craig and Sergeant Kuth, claiming they used excessive force during the arrest in violation of the Fourth Amendment.

On appeal, the Ninth Circuit held that the excessive force claims against both Officer Craig and Sergeant Kuth could proceed to trial, reversing a lower court's dismissal of the case on summary judgment and rejecting a qualified immunity defense put forward by Officer Craig.

The Supreme Court disagreed with the Ninth Circuit's assessment of the claims as to both defendants. As to Sergeant Toth, the high court ruled that the excessive force claim could not proceed, and found the Ninth Circuit's reinstatement of the claim "puzzling" since "only Officer Craig was involved in the excessive force claim."

In regards to Officer Craig, the Supreme Court criticized the Ninth Circuit's analysis as too general. Under Supreme Court precedent, "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The clearly established right must be defined with specificity. Here, the high court found that the Ninth Circuit had erred by failing to address how prior case law specifically prohibited Officer Craig's actions. The Supreme Court therefore remanded the case to the Ninth Circuit for further consideration of Officer Craig's qualified immunity defense.

City of Escondido, Cal. v. Emmons, __ S. Ct. __, 2019 WL 113027.

EMPLOYEE RESTRICTIONS

Court Employer Could Restrict Wearing of Union Insignia and On-Duty Solicitation, But Rule Restricting Distribution of Literature Was Impermissibly Ambiguous.

Overturning conclusions reached by the Public Employment Relations Board (PERB), the Court of Appeal found that a trial court employer could prohibit employees from wearing union insignia at work or soliciting during work hours. However, the Court of Appeal agreed with PERB that a rule restricting employees from distributing literature in "working areas" at any time was impermissibly ambiguous.

The union-represented employees included over 300 office assistants, judicial assistants, account clerks, court reporters and marriage and family counselors. The Personnel Rules in question included restrictions on:

1. wearing clothing or adornments with any writings or images, including pins, lanyards and other accessories;
2. soliciting during work hours for any purpose without prior approval from the employer; and
3. distributing literature during non-work time in working areas.

Restrictions on wearing any writings or images

The employer's Personnel Rules imposed restrictions on the nature and type of clothing employees could wear. The relevant provision was specifically challenged under the allegation that it improperly infringed upon employees' rights to wear union regalia at the workplace.

State and federal laws generally provide public employees the right to wear union buttons and other union paraphernalia at work, except in "special circumstances" that justify a prohibition. To decide whether special circumstances exist, PERB and the courts weigh the right of employees to wear union insignia against any legitimate employer interest in prohibiting this activity. The specific details of the employer's operations, and employee interactions with the public, are relevant to the analysis.

Here, the Court of Appeal noted that that the "legitimacy of the Judicial Branch depends on its reputation for impartiality and nonpartisanship," and this necessarily requires the courts to maintain a neutral appearance. Evidence also showed that court employees regularly interacted with the public and were subject to a code of ethics that required them to maintain the appearance of impartiality. Therefore, the employer had a substantial interest in regulating its workforce to ensure that the judicial process appeared impartial. The Court of Appeal found that this justified the broad restrictions on wearing union insignia.

Prohibition on solicitation during working hours for any purpose

The Personnel Rules prohibited solicitation during "working hours" and defined "working hours" as "the working time of both the employee doing the soliciting and distributing and the employee to whom the soliciting is being directed." Since the provision

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unambiguously permitted nondisruptive solicitation during nonworking time, the Court of Appeal found that it was lawful.

Prohibition on distribution of literature during nonworking time

The Court of Appeal found that the employer's rule restricting distribution of literature "at any time for any purpose in working areas" was impermissibly ambiguous. The rule did not define the term "working areas," and certain sections of the courthouse were designated as mixed areas for work and non-work use. Under the circumstances, an employee could reasonably interpret the rule to mean that distribution of literature was prohibited in mixed-use areas even during off-duty time.

Under PERB precedent, an ambiguous rule constitutes interference with a protected right if the ambiguity tends to or does result in some harm to employee rights. Here, the Court of Appeal found that the ambiguous rule put employees at risk of discipline for violating the rule and this risk would tend to cause employees to err on the side of caution and forgo exercising the right to distribute literature in mixed-use areas during employee breaks.

Superior Court of Fresno v. Public Employment Relations Board, __ Cal.Rptr.3d __, 2018 WL 6583386.

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SB1421: WHAT'S HAPPENING NOW?

WEBINAR

PRESENTED BY:
J. SCOTT TIEDEMANN,
MANAGING PARTNER
LOS ANGELES OFFICE

A CRITICAL UPDATE ON SB 1421 AND ITS EFFECT ON PEACE OFFICER PERSONNEL RECORDS.

MARCH 14, 2019
10:00 A.M. - 11:00 A.M.

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LCW

Firm Activities

Consortium Training

Feb. 6 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Central Coast ERC | Paso Robles | Kelly Tuffo

Feb. 7 **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"**
Bay Area ERC | Webinar | Heather R. Coffman

Feb. 7 **"Advanced FLSA"**
Gateway Public ERC | La Mirada | Jennifer Palagi

Feb. 7 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
San Mateo County ERC | Menlo Park | Morin I. Jacob

Feb. 11 **"Fire Management Academy"**
San Diego Fire Districts | San Diego | Stefanie K. Vaudreuil

Feb. 13 **"Human Resources Academy I" and "Introduction to the FLSA"**
San Gabriel Valley ERC | Alhambra | Jennifer Palagi

Feb. 14 **"Human Resources Academy II" and "Negotiating Modifications to Retirement and Retiree Medical"**
San Diego ERC | San Marcos | Frances Rogers

Feb. 20 **"Legal Issues Regarding Hiring & Promotions" and "Human Resources Academy I"**
Central Valley ERC | Clovis | Tony G. Carvalho & Jesse Maddox

Feb. 20 **"Employees and Driving" and "Navigating the Crossroads of Discipline and Disability Accommodation"**
North State ERC | Orland | Kristin D. Lindgren

Feb. 20 **"Workplace Bullying: A Growing Concern" and "Prevention and Control of Absenteeism and Abuse of Leave"**
Ventura/Santa Barbara ERC | Camarillo | Christopher S. Frederick

Feb. 21 **"Technology and Employee Privacy"**
LA County HR Consortium | Los Angeles | Christopher S. Frederick

Feb. 21 **"Public Service: Understanding the Roles and Responsibilities of Public Employees" and "Managing the Marginal Employee"**
South Bay ERC | Redondo Beach | Laura Drottz Kalty & Ronnie Arenas

Feb. 28 **"Management Guide to Public Sector Labor Relations" and "Exercising Your Management Rights"**
Napa/Solano/Yolo ERC | Suisun City | Jack Hughes

Feb. 28 of Writing **"Maximizing Performance Through Evaluation, Documentation and Corrective Action" and "The Art the Performance Evaluation"**
West Inland Empire ERC | Chino Hills | Christopher S. Frederick

Customized Training

Jan. 18 **"Embracing Diversity"**
Los Angeles Conservation Corps | Los Angeles | Jennifer Rosner

Jan. 24, 30 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Santa Monica | Christopher S. Frederick

Jan. 29 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Ventura | Shelline Bennett

Feb. 5,7,12,14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Midpeninsula Regional Open Space District | Los Altos | Erin Kunze

Feb. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Midpeninsula Regional Open Space District | Los Altos | Lisa S. Charbonneau

Feb. 7 **"Bias in the Workplace"**
ERMA | Hughson | Kristin D. Lindgren

Feb. 7 **"Supervisor's Guide to Public Sector Employment Law"**
Mariposa County | Mariposa | Gage C. Dungy

Feb. 11 **"Ethics in Public Service"**
City of Bellflower | James E. Oldendorph

Feb. 13 **"Technology and Employee Privacy in the Workplace"**
City of Fountain Valley | Laura Drottz Kalty

Feb. 13 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Midpeninsula Regional Open Space District | Los Altos | Lisa S. Charbonneau

Feb. 20, 21 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Mendocino County | Ukiah | Jack Hughes

Feb. 26 **"Legal Issues Update"**
Orange County Probation | Santa Ana | Christopher S. Frederick

Feb. 28 **"DOT and Reasonable Suspicion"**
City of Mountain View | Heather R. Coffman

Speaking Engagements

Jan. 30 **"AB 1661 Training"**
League of California Cities New Mayors and Council Members Academy | Irvine | Laura Drottz Kalty

Feb. 5 **"Annual Employment Law Update: Recent Cases and Trends"**
California Special Districts Association (CSDA) Webinar | Gage C. Dungy

Feb. 21 **"Legislative and Legal Update"**
Southern California Public Labor Relations Council (SCPLRC) Annual Conference | Lakewood | J. Scott Tiedemann

Seminars/Webinars

Jan. 18 **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | San Diego | Judith S. Islas

Jan. 23 **"Costing Labor Contracts"**
LCW Conference 2019 | Palm Desert | Peter J. Brown & Kristi Recchia

Jan. 24-25 **"2019 LCW Conference"**
Liebert Cassidy Whitmore | Palm Desert

Jan. 28 **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett

Jan. 28	**"Train the Trainer Refresher: Harassment Prevention"** Liebert Cassidy Whitmore | San Francisco | Erin Kunze
Feb. 6	**"Hot Topics in Negotiations"** Liebert Cassidy Whitmore | Webinar | Richard C. Bolanos
Feb. 15	**"Train the Trainer: Harassment Prevention"** Liebert Cassidy Whitmore | Fresno | Shelline Bennett
Feb. 13	**"Trends & Topics at the Table"** Liebert Cassidy Whitmore | TBD | Kristi Recchia
Feb. 19	**"Train the Trainer: Harassment Prevention"** Liebert Cassidy Whitmore | San Diego | Judith S. Islas
Feb. 26	**"Nuts & Bolts of Negotiations"** Liebert Cassidy Whitmore | Fresno | Shelline Bennett & Kristi Rechia

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